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Brumley v. Utah State Tax Commission : Reply Brief

Utah Supreme Court

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BRIEF

IN THE UTAH SUPREME COURT

WENDELL E. BRUMLEY, et al.,	)	
Plaintiffs/Cross-Appellants,	)	
	)	Appeal No. 91-0242
vs.	)	
UTAH STATE TAX COMMISSION, et al.,	)	Priority No. 11
Defendants/Appellants.	)	

REPLY BRIEF OF DEFENDANTS AND RESPONDE TO PLAINTIFFS' CROSS-APPEAL

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INTRODUCTION

Davis v. Michigan, 489 U.S. 803 (1989), was decided on March 28, 1989. Prior to Davis, the law supported Defendants' method of taxation. The Davis decision profoundly altered state taxation.

This Court should view the date of the decision as the watershed event in deciding this case. Neither Plaintiffs nor Defendants could have reasonably foreseen the implications of Davis, a decision which has exposed twenty-three states to massive potential refund liability. The lack of foreseeability and surprise is evident from the failure of any member of Plaintiffs' Class to pay their taxes under protest prior to Davis, to ever file a petition for relief before the Tax Commission, or to ever challenge the law in any state or federal court. Plaintiffs' conduct prior to March 28, 1989, is the best proof of the revolutionary nature of the Davis decision.

Plaintiffs seek to obtain refunds for four years. However, Davis did not mandate refunds; Davis mandated equal treatment. The issue of refunds was absent from the Supreme Court's consideration because Michigan had conceded a refund if Mr. Davis prevailed.

Plaintiffs have ignored the Legislature's special session to amend Utah's law and the fact that Utah has now totally implemented the rule in Davis by treating all retirees equally, retroactive to January 1, 1989.

Unsatisfied with the legislative action, Plaintiffs now

seek the benefit of the modest exemption given to state employees prior to Davis. They demand 104 million dollars in refunds for tax years 1985-1988 compared to the 8.3 million dollars benefit given to state retirees for the same period.

The Court should view this case from the vantage point of March 28, 1989. The Court will see from that perspective that Utah has complied with Davis, and that the Plaintiffs are not entitled in law or equity to the refund they seek. The Legislature applied the rule in Davis expeditiously and fairly. No further relief need be given in the form of unexpected refunds. Plaintiffs' demand would fiscally punish the citizens of Utah for the modest preference to former state employees.

POINT I

NEITHER STATE NOR FEDERAL LAW MANDATES TAX REFUNDS.

A. Applying the Beam Decision.

1. State Courts After Beam Have Found That The Issue of Retroactivity Was Not Before the Court in Davis. Accordingly, the Chevron Test Mandates Purely Prospective Application of Davis.

Because Michigan conceded a refund to the taxpayer in Davis, the question of retroactivity was moot. Davis, 489 U.S. at 817. The Court did not address it. Accordingly, Davis should be applied prospectively.

Numerous state courts, after James B. Beam v. Georgia, 111 S.Ct. 2439 (1991), have found that Davis should be

prospectively applied. The South Carolina Supreme Court in Bass v. South Carolina, 23216 (South Carolina Supreme Court, January 27, 1992), found:

> [I]n Davis, the retroactivity issue was not before the Court because Michigan conceded that the refunds were due to Davis under state law if the statute were held unconstitutional . . . . Furthermore, the principle of equality or equal treatment to similarly situated litigants does not require that all future litigants, including the litigants in the present case, are bound by the stipulation of the State of Michigan in Davis.

Three other state appellate courts, after Beam, have used similar reasoning to find that Davis be prospectively applied. See Duffy v. Wetzler, 90-07800, (N.Y. App. Div., January 15, 1992) ("We would also note consistently with the Beam decision that the Davis court never applied its own rule since Michigan 'conceded that a refund [was] appropriate . . . .'"); see also Swanson v. North Carolina, 407 S.E.2d 791 (N.C. 1991) ("In Beam the Court had an opportunity to say that the rule of Chevron should no longer be applied in civil cases, but it declined to do so."); see also Sheehy v. Montana, 820 P.2d 1257 (Mont. 1991) (the issue of retroactivity of Davis was not before the Court). This Court should also decide that Davis should be prospectively applied.

Plaintiffs assert Beam "is dispositive of the

retroactivity issue."[1] (Plaintiffs' Opening Brief at 13, (emphasis added).) This is doubtful in light of the post-Beam cases discussed above. Plaintiffs argue that Beam makes Davis apply retroactively on three grounds.[2] All of these arguments are meaningless because the issue was not raised in the Davis litigation. This position supported the state court decisions discussed above. This Court should adopt the reasoning of those courts.

2. Justice Souter's Citation to Davis in Beam Received Only His Vote and One Other; It Should Be Given Little Weight.

The citation to Davis in Justice Souter's opinion in

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[1] Plaintiffs further allege that Beam is "a 6-3 opinion." (Plaintiffs' Opening Brief at 14.) Plaintiffs would have this Court believe that Beam is a majority opinion. The Beam decision caused a New York intermediate court to remark: "It goes without saying that Beam is not susceptible to easy explanation and requires the unsalutatory procedure, as in all plurality decisions, of a judicial head-count." Duffy v. Wetzler, 90-07800, (N.Y. App. Div. January 15, 1992). This Court can review Beam to determine if it is "dispositive" and if it commands a majority of the Court. Copy attached as Appendix.

[2] Plaintiffs argue:

> Under the Beam analysis, a U.S. Supreme Court opinion is retroactive to its litigants and thus to all others, if 1) the court applied its decision retroactively, or 2) the court allowed consideration of remedies, or 3) the court did not reserve the issue of retroactivity (silence).

Plaintiffs' Opening Brief at 17.

Beam was a "cf."[3] Plaintiffs argue "[i]f there is any doubt on this issue [whether Davis applies retroactively], the Beam court's citation to Davis as analogous supporting authority should resolve the issue". (Petitioners' Opening Brief at 20, (emphasis in original).) Plaintiffs mislead this Court by arguing that the "Beam court" spoke on this issue. The citation Defendants refer to appears in Justice Souter's opinion. 111 S.Ct. 2439 (1991) (Souter, J., Plurality Opinion announcing Court's decision). It was one of five opinions. It was not a majority opinion. Plaintiffs are asking this Court to base its decision on dicta, which was cryptic at best, and received only Justice Souter's vote and one other. It is also contrary to the opinions of the numerous state appellate courts dealing with Davis related actions in a post-Beam time frame.

B. The Proper Test for Determining Whether Davis Applies Retroactively is the Chevron Test.

A decision will operate prospectively only:

1. If a new principle of law is established by

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[3] The meaning of "cf." is:

> Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means compare. The citation's relevance will usually be clear to the reader only if it is explained.

The Blue Book: A Uniform System of Citation, 15th Edition at 23, (1991) (Published and distributed by the Harvard Law Review Association.) In Beam, no parenthetical explanation was given by Justice Souter; this Court should give it little weight.

overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

2. If prospective only application will not retard the operation of the rule in question; and

3. If retroactive application will result in inequity, injustice, or hardship. Chevron v. Huson, 404 U.S. 97, 106-107 (1971).

1. Davis Operates Prospectively Under the First Chevron Factor.

a. It is Undisputed that the "Significant Difference" Standard Set Forth in Davis is a New Rule of Law.

Plaintiffs do not rebut that the "significant difference" standard in Davis is a new rule of law. The previous constitutional standards were uprooted by the Davis decision. (See Defendants' Opening Brief at 57-60.) Accordingly, Davis established a new rule of law.

b. Davis is a Case of First Impression Holding that § 111 Immunity From Discriminatory Taxation is Co-extensive With the Constitutional Doctrine of Intergovernmental Tax Immunity.

Plaintiffs allege that Defendants' position, that § 111 immunity from discriminatory taxation is coextensive with the constitutional doctrine of intergovernmental tax immunity is a new rule of law, "is incredible." (Plaintiffs' Opening Brief at 35.) They make two arguments.

First, they allege "the U.S. Supreme Court expressly

relied on a long line of cases. . . ." (Plaintiffs' Opening Brief at 36.) However, Plaintiffs neither provide supporting authority nor give an explanation of the law's development. The development of the law in this area is explained in Defendants' Opening Brief. (See Defendants' Opening Brief at 55-57.) Plaintiffs concede, "Davis is the first case interpreting § 111 . . . ." (Plaintiffs' Opening Brief at 34 n.12.) Because the U.S. Supreme Court had not previously considered the issues in Davis, this interpretation of § 111 was a matter of first impression.

Second, Plaintiffs argue that the "plain meaning" of 4 U.S.C. § 111 is a limited waiver of sovereign immunity from state taxation. (Plaintiffs' Opening Brief at 36.) The lack of plainness within the context of Davis is underscored by the fact that the statute went unchallenged for decades. Accordingly, this Court should find that Davis established a new rule of law.

c. The holding that the 'pay or compensation for personal service as an officer or employee of the United States' applies to pension benefits received by employees was a new rule of law.

In Davis, the Court remarked that "Congress could perhaps have used more precise language" in suggesting that current pay to federal employees constituted deferred compensation, the taxation of which would be in violation of the intergovernmental immunity doctrine. Davis, 489 U.S. at 810.

Plaintiffs argue that Kizas v. Webster, 707 F.2d 524

(D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984), holds federal pensions are deferred wages. (Plaintiffs' Opening Brief at 34.) However, Kizas held that statutes and regulations determine federal employees' rights; it did not discuss the deferred compensation issue. Id. at 534-538.

Not one of the three cases cited in Davis was decided under § 111. The cases lack analysis of whether retirement benefits constitute deferred compensation. Consequently, Defendants could not have foreseen the new rule in Davis.

One of the cited cases held that federal pensioners are a class distinct from state and private pensioners to whom "[t]he United States . . . has special responsibilities and obligations . . . that it does not have to non-federal retirees." Clark v. United States, 691 F.2d 837, 841-842 (7th Cir. 1982). Consequently, disparate treatment between State and private pensioners would appear to be a logical extension of the Clark holding.

Plaintiffs cite Fitzpatrick v. Tax Comm'n, 386 P.2d 896 (Utah 1963), for the proposition that the Tax Commission's position is that retirement income is deferred compensation. (See Plaintiffs' Opening Brief at 34-35.) Plaintiffs ignore the distinguishing facts in Fitzpatrick. (See Defendants' Opening Brief at 54 n.14.) Fitzpatrick was decided under common law contract principles.

Conversely, the analysis applied to federal workers

must be based on federal statutes and regulations. See Kizas, 707 F.2d at 535. Plaintiffs admit that "[i]nterpreting a federal statute is a far different matter from interpreting the Constitution or common law." (Plaintiffs' Opening Brief at 25.) Accordingly, Davis indeed established a new rule of law by holding that "pay or compensation for personal service as an officer or employee of the United States" included pension benefits.

2. Prospective Only Application Will Not Retard the Operation of the Davis Case.

Utah has satisfied the second prong of Chevron by amending its statute. No additional action is necessary. Utah's statute is fully implemented. It provides equal treatment to all retirees. Accordingly, prospective only application of Davis is appropriate.

3. The Overwhelming Evidence Contained in the Record Supports a Finding that Retroactive Application of the Davis Decision Would Result in Inequity, Injustice, and Hardship.

If Plaintiffs prevail, the refund is estimated at 104 million dollars. (R. 725.) This is in contrast to 8.3 million dollars estimated benefit received by state retirees for the same years. (R. 1059.)

Prior to the Davis decision, the legality of the tax exemption had never been contested in Utah administrative or court proceedings. (R. 701, 707, 713-14, 717, 1031, 1054-55.) The Utah State Tax Commission believed it was acting lawfully in

taxing federal retirement income based upon existing laws. (R. 713.) The State relied in good faith on preferential treatment of state employees as part of a benefit program for state employees. (R. 701, 707.) The State has expended the unprotested taxes paid by retirees for years 1985-1988; the funds are no longer available for refunds. (R. 702, 708.) Thousands of other taxpayers have paid taxes on their private pension income yet have no claim for monetary relief. Plaintiffs insist that other taxpayers should now pay more or suffer program reductions so Plaintiffs can receive the benefit of the exemption. Nothing could be more unfair. The equities mandate prospective only application of Davis.

Plaintiffs fail to rebut the fiscal impact of retroactive application of Davis on the State of Utah, and the state's reliance on Plaintiffs' past inaction.[4] (R. 699-789, Exhibits A-I.) Instead, they argue:

> When the trial court agreed and granted the motion to strike the affidavits submitted by Defendants, Plaintiffs did not need to present any evidence contesting the affidavits. Should this court determine the trial court erred in striking Defendants' affidavits, the proper course on remand would be to allow the Plaintiffs the opportunity to present evidence regarding hardship to

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[4] Plaintiffs ask this Court to take judicial notice of Deseret News articles dated January 6-7, 1992. (Plaintiffs' Opening Brief at 64 n. 36.) Defendants Object. Plaintiffs fail to show that this source meets the requirements of Utah R. Evid. 201(b). Plaintiffs also fail to meet the relevancy requirements of Utah R. Evid. 401 and 403.

> members of the class and regarding the second and third prongs of Chevron.

Plaintiffs' Opening Brief at 29 n.9.

This request misleads the Court. The District Court ruled on the Motions for Summary Judgment and Motion to Strike at the same hearing. (See Defendants' Opening Brief Appendix 4 at pp. 3-5.) Consequently, Plaintiffs' claim that they did not need to submit affidavits because the Court had already ruled them as irrelevant contradicts the record.

Utah R. Civ. P. 56(c) provides: "The adverse party prior to the day of hearing may serve opposing affidavits." Thus, when the District Court heard the Motion to Strike, the time had expired for Plaintiffs to file opposing affidavits. It would be inappropriate to ignore Rule 56 and allow Plaintiffs to supplement the record.

C. The Plain Language of 4 U.S.C. § 111 Did Not Compel the Davis Holding; Statutory Interpretation was Required.

Plaintiffs argue that this Court need not apply the Chevron retroactivity doctrine because § 111 is plain and unambiguous. (Plaintiffs' Opening Brief at 22.) Section 111 provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing

> authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

(Emphasis added.)

The plain language of § 111 bars discriminatory taxation "of pay or compensation for personal service." It says nothing of retirement annuities. Further, it bars discriminatory taxation of any "officer or employee" of the federal government. It mentions nothing about former officers and employees of the federal government. To reach such a conclusion, the statute must be interpreted. Because it is subject to interpretation, it is not plain and unambiguous.

Michigan made a similar argument in Davis. The majority in Davis concluded that this type of a "hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation . . . ." Davis, 489 U.S. at 809. The Court went on to construe the statute to provide a different meaning. Id. The Davis majority also found that "Congress could perhaps have used more precise language . . . ." in drafting § 111. Id. The dissent gave the statute yet another meaning. See id. at 818 (Stevens, J. dissenting). Also, numerous state courts have given their own interpretations to pre-Davis § 111. These differing interpretations of § 111 emphasize that there is no plain and unambiguous interpretation of § 111. Accordingly, the statute is

susceptible to interpretation.

D. It is Undisputed that the Court's Order Striking Defendants' Affidavits, Which are Relevant Under the Federal Analysis, Exceeded the Bench Ruling.

It is undisputed that the District Court's bench ruling specifically struck only four of Defendants' affidavits. It is also undisputed that no objections were made to four additional affidavits attached to Defendants' Reply Memorandum of Points and Authorities In Support of Defendants' Cross-Motion for Summary Judgment. (See Defendants' Opening Brief at 79.) The stricken affidavits are relevant under the Chevron analysis. Consequently, this Court should reverse the Order striking all of Defendants' Affidavits.

E. It is Undisputed that the District Court Erred in Holding that Plaintiffs were Entitled to Tax Refunds Pursuant to State Law.

Plaintiffs have not disputed that the District Court erred in finding that Plaintiffs merited a tax refund solely under State law.[5] (See Defendants' Opening Brief at 39-47.) The Plaintiffs argue that this Court should first determine the meaning of 4 U.S.C. § 111. (See Plaintiffs' Opening Brief at 9-40.). They provide no grounds for a tax refund that operates independently of that federal statute. Accordingly, the District Court must be reversed.

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[5] Defendants also rely on the state law defenses of laches and waiver. (See Defendants' Opening Brief at 44-47.) As previously argued, the District Court erred by not finding Plaintiffs' claims are barred by these defenses.

POINT II

REMEDIES.

The remedy ordered by the District Court was draconian and the Court abused its discretion. Without support, Plaintiffs assert that Defendants would not make such a claim were Plaintiffs fewer in number.

Plaintiffs ignore the legal doctrine of this Court in Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984). In Rio Algom, this Court was confronted with the constitutionality of a property tax statute providing for preferential treatment of centrally assessed versus locally assessed taxpayers. After ruling the statute in question unconstitutional, this Court went on to deal at length with the issue of a prospective versus retroactive remedy. In Rio Algom, this Court relied on other states' case law and granted a prospective-only remedy:

> These state decisions rely on the need to preserve the financial solvency of local government units, the great financial and administrative hardship that would be entailed if general retroactive effect were allowed, and the tax authorities' justifiable reliance on the statute, which is presumptively constitutional. To the objection that an unconstitutional act is void from its inception so that everything done thereunder must be undone, the New Jersey Supreme Court cited the importance of recognizing "that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional taxation statute." Salorio v. Glazer, 93 N.J. at 563, 461 A.2d at 1108. In fashioning an equitable remedy, reliance interests weigh heavily, and

> the court should seek a blend of what is necessary, what is fair, and what is workable.

Id. at 196.

In Rio Algom, a number of taxpayers paid their taxes under protest prior to the Court's decision. However, this Court directed that the holding of unconstitutionality be prospective from January 1, 1984, the year in which the decision was announced. The Court granted retroactive relief to the parties who paid under protest, timely prosecuted their appeals, and put the state and local taxing authorities on notice of the constitutional challenge. In this case, the only payments under protest were made for tax year 1988. Plaintiffs' claims should be treated consistently within the framework of Rio Algom, and in no case should relief be given where no payments under protest were made.

Both parties have discussed the impact of McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990). Plaintiffs suggest that Utah provides no predeprivation proceedings consistent with that case. (See Plaintiffs' Opening Brief at 60-62.) This ignores the declaratory judgment statute and administrative rule to request declaratory judgments before the Tax Commission. See Utah Code Ann. § 63-46b-21 (1) (1989); see also Utah Admin. R861-1-5A

(Q).[6] Plaintiffs' claim also ignores the alternative of not paying the tax and being subject to a subsequent audit. Many federal retirees chose the latter alternative. See Utah Code Ann. § 59-1-501 through 505.

It is Defendants' position that McKesson *does not* dispose of the present proceeding for four reasons: (1) McKesson involves a Commerce Clause issue; (2) Utah provides predeprivation remedies; (3) McKesson involved a clear and foreseeable constitutional violation, and (4) most importantly, McKesson was a remedies, not a choice of law case. However, the case suggests remedies which Plaintiffs have overlooked and which McKesson indicated would satisfy minimum federal due process requirements. (See Defendants' Opening Brief at 83.)[7] It is clear from McKesson and Utah law that a number of remedies exist that are less draconian than the full refund Plaintiffs demand.

In their argument that equity follows the law, Plaintiffs cite a dissent at length. See Swanson v. State, 407 S.E.2d 791 (N.C. 1991). While arguing that the law ought to be

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[6] Formerly R865-05A(P) (1987); A12-01-1:5(6) (1983).

[7] In McKesson, the Supreme Court gave the following examples of postdeprivation remedies that satisfy minimum federal Due Process requirements.

1. Full refund of tax assessed over the amount competitors had been charged;
2. Collection of back taxes from those parties benefiting from lower tax rates; and
3. A combination of tax refunds to Petitioners and retroactive taxation of those parties taxed at a lower rate. Id. at 2252.

followed, Plaintiffs ignore the available statutory and administrative procedures discussed herein.

Plaintiffs ask the Court to view this case as 34 thousand small cases. However viewed, the impact is the same -- 104 million dollars of potential refunds to a class of Plaintiffs who never filed one administrative or judicial proceeding prior to the Davis decision. Had the State persisted in allowing the state retiree exemption in a post-Davis setting, Plaintiffs' claim of foreseeability would be more understandable. Given the surprise and revolutionary nature of the Davis decision, to imperil all of the State's other taxpayers and its already leanly budgeted programs is inequitable.

In other states with similar statutes, where liability related to Davis has been established, more reasonable remedies have been fashioned. The Arizona Tax Court ruled that Arizona federal retirees should be entitled to a refund equal to the increment of tax which they would not have had to pay had the preference for state employees not existed. Bohn v. Waddell, 807 P.2d 1 (Ariz. Tax 1991). The Arizona relief granted Plaintiffs six cents on the dollar, and put them in a position they would have enjoyed had the state retiree exemption not existed.

Because of Plaintiffs' generous federal pensions and the large number of federal retirees, the refund may amount to 104 million dollars; whereas, the cost to the state for the state retirees preference for 1985-1988 was 8.3 million dollars. (R.

725, 1059.) Clearly Plaintiffs' demand under the facts is excessive.

The Utah Legislature has twice had the opportunity to ratify Plaintiffs' view of this case and order refunds. The first opportunity was when the retirement law was amended in September 1989. Retirement Exemption Elimination Act, 1989 Utah Laws ch. 7 §§ 1-4. The second opportunity was in February 1990 when the filing period for 1985 claims was extended. Tax Filing Amendments Act, 1990 Utah Laws ch. 21 §§ 1-4. Both times, the Legislature chose not to grant Plaintiffs' requests.

POINT III

THE DISTRICT COURT'S CLASS DEFINITION IS OVERBROAD.

A. The Remedy Procedure for Taxes Deemed Illegal is Payment Under Protest and Filing Suit in District Court. Only a Few Members of Plaintiffs' Class Have Followed This Procedure.

To receive a refund of allegedly illegal taxes, an individual Plaintiff must have first paid these taxes under protest and then filed an action in District Court. See Utah Code Ann. § 59-1-301. Defendants concede that the District Court has jurisdiction for any Plaintiff meeting this requirement. A six month statute of limitations applies. Utah Code Ann. § 78-12-31 (1987). Anyone who has not complied with this statutory requirement cannot be included within the class. The class as defined includes the years 1985-1988. (R. 281.) However, there

is nothing in the record showing payment under protest for years 1985-1987.

1. There Can Be No "Overpayment" Without Retroactive Application of Davis.

Plaintiffs argue for tax refunds under an "overpayment" theory. See Utah Code Ann. § 59-10-529(1-6). There is a three year limitations period for actions brought under this statute. However, Plaintiffs' analysis begs the fundamental question: What is the meaning of "overpayment," and what is the proper forum for "overpayment" claims?

At the time these taxes were paid, there was no overpayment. The application of the Utah tax exemption to federal retirees went unchallenged for at least 40 years. When Plaintiffs calculated, filed, and paid their taxes there was no "overpayment." All taxes were proper prior to the Davis decision. Consequently, this Court should determine that "overpayment" never occurred for tax years prior to the date of that decision.

Plaintiffs' argument is that Utah has incorporated the federal definition of "overpayment," and it includes illegal taxes. (Plaintiffs' Opening Brief at 47.) In support of this, Plaintiffs argue that the federal government has repealed its payment under protest requirement for illegal taxes. (Id. at 45.)

In contrast, Utah has two separate statutes to the

federal government's single "overpayment" provision. One statute governs "overpayments." The procedure under this statute is to seek relief by filing a refund claim with the Utah State Tax Commission. Utah Code Ann. § 59-10-531(1). The second statute specifically governs where taxes are alleged to be illegal. Utah Code Ann. § 59-1-301. The procedure under this statute is to seek a remedy in the District Court by paying the tax under protest and then bringing suit. There is no need to incorporate the specific "illegal tax" provision into the more general overpayment statute as the federal government has done. The federal government has done this because the federal illegal tax provision has been repealed. (Plaintiffs' Opening Brief at 45.)

The Utah Income Tax Act requires Utah "to conform, to the extent practicable, certain of the existing rules of procedure . . . to corresponding or apposite rules of administration and procedure prescribed by the federal income tax laws . . . ." Utah Code Ann. § 59-10-102(4) (1987) (emphasis added). Definitions are the same as those under federal law "unless a different meaning is clearly required . . . ." Utah Code Ann. § 59-10-103(2) (1987 and Supp. 1991). Plaintiffs concede that there is no "corresponding or apposite" federal rules of procedure allowing a party to elect a remedy depending on the nature of the tax. Accordingly, the federal definition of "overpayment," which includes alleged illegal taxes, cannot be incorporated into the Utah "overpayment" statute.

Utah has a specific remedial provision for alleged illegal taxes. Because that provision is on point, the broad federal definition of "overpayment" does not apply. Therefore, the Court must apply § 59-1-301 as a procedural bar to any Plaintiffs who have not paid tax under protest and filed suit within six months in the District Court. The District Court improperly included in the class definition claims for tax years 1985-1987. There is no evidence showing that any Plaintiff paid under protest for those years. Hence, the District Court had no jurisdiction over those claims. It should be reversed.

2. Plaintiffs' Argument That Payment Under Protest Was Repealed More Than Sixty Years Ago Ignores the Wright Decision Made Twelve Years Ago By This Court.

Plaintiffs argue: "[w]ith its incorporation of federal tax law and procedure, Utah has adopted a system which rejected a protest requirement for income taxes more than sixty years ago." (Plaintiffs' Opening Brief at 45 (footnote and emphasis omitted).)

Plaintiffs ignore Utah law. In Tax Comm'n v. Wright, 596 P.2d 634 (Utah 1979), a taxpayer sought to test the legality of different income tax rates for married and single persons. Id. The Court found that:

> '[I]t is not for the tax commission to determine questions of legality or constitutionality of legislative enactments.' Shea v. State Tax Comm'n, 120 P.2d 274 (1941). These questions could, however, have been raised by an independent action in a

> district court pursuant to Sections 59-11-10 or 59-11-11 [Present 59-1-301 (payment under protest)].

Id. at 636 (footnote omitted).[8] Thus, for Plaintiffs to argue that Section 59-1-301 was repealed over sixty years ago is contrary to Wright.

3. Section 59-10-529 Is An Administrative Remedy. It is Unavailable in the District Court.

Plaintiffs fail to understand that the remedy set forth in § 59-10-529 is an administrative remedy. They attempt to use it to expand the size of the class. Plaintiffs rely on Pacific Intermountain Express Co. v. State Tax Comm'n, 316 P.2d 549 (1957). (See Plaintiffs' Opening Brief at 49-53.) In Pacific Intermountain, the taxpayer contested the validity of a sales tax and sought redress in the district court. Id. His challenge was based on statutory interpretation. Id. at 550. The challenge was not one of illegality or unconstitutionality of tax laws. He argued that the District Court had jurisdiction under Utah Code Ann. § 59-11-11, (1953) [§ 59-1-301]. However, the Tax Commission claimed it had administrative jurisdiction under the sales tax act. The issue before the Court was procedural: "Can an action to recover sales tax be maintained in the district court?" Id. at 550.

The Court concluded that there was a conflict between

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[8] For the history of present 59-1-301 see Defendants' Opening Brief at 22 n.1.

the statutes argued by the parties. It said:

> Sec. 59-11-11 [present § 59-1-301] is of ancient origin. It has existed in our law since statehood, and sets out the historical method of contesting payment of taxes. It is general in its terms; has usually been applied to disputes over property taxes and is found in the "miscellaneous" provisions of the tax code. On the other hand, Secs. 59-15-12 to 15, upon which the Tax Commission relies, are of more recent origin, being part of the Sales Tax Act itself, which was enacted in 1933; and are explicit as to the manner in which a taxpayer dissatisfied with a sales tax assessment may challenge it.

Id. at 551 (footnotes omitted). The Court found that only by electing an administrative remedy could the statutory interpretation of the Tax Commission be challenged. Id. at 551. The Court refused to allow the taxpayer to use the administrative remedy in the District Court. Id.

Pursuant to the analysis of Pacific Intermountain, relief under § 59-10-529 is only available in the administrative setting. Plaintiffs below sought relief in District Court. This Court cannot accept Plaintiffs' reading of Pacific Intermountain. It must conclude that Plaintiffs have elected to proceed in District Court and cannot expand the class definition with a purely administrative remedy that is unavailable in that forum. Only Plaintiffs paying their taxes under protest and bringing suit in District Court within six months can properly challenge the legality or constitutionality of the exemption.

This is made clear by the election of remedies

provision found in § 59-10-531 (1987):

> (1) Any taxpayer claiming to be entitled to a refund or credit under the provisions of § 59-10-529 ["overpayment" statute] may file a claim for the refund or credit with the commission within the time provided in that section.
> (2) No claim may be filed for refund or credit on any tax for which the taxpayer has sought judicial review.

(Emphasis added.)

As subsection (1) makes clear, this statute, § 59-10-531, applies to the "overpayment" provision of § 59-10-529. Subsection (2) provides that no refund or credit is available under § 59-10-529 ("overpayment") if a taxpayer has sought judicial review by electing to proceed in District Court. This statute restricts the District Court from exercising jurisdiction over a taxpayer seeking relief from an "over-payment." Utah District Courts have jurisdiction over all matters except as limited by the Constitution or statute. See Utah Const. Art. VIII § 5 (1991); see also State v. Johnson, 114 P.2d 1034, 1039 (Utah 1941). The Tax Commission has exclusive jurisdiction over income tax matters except in a limited number of circumstances. See Utah Code Ann. § 59-10-544 (1987) ("[T]he commission shall administer and enforce the tax" imposed in the Individual Income Tax Act.) Only one of those exceptions applies in this case -- Plaintiffs paying taxes under protest and bringing suit in

District Court for tax year 1988.[9]

Finally, Plaintiffs contend that the Utah State Legislature specifically provided for a three year limitations period when it adopted House Bill 373 in February of 1990. They contend that this bill "had the express purpose of extending the three year limit for claims under § 59-10-529(7) . . . ." (Plaintiffs' Opening Brief at 44.)

This contention is flawed for two reasons. First, it fails to recognize § 59-10-529 as the administrative remedy. The argument assumes as its basic premise that § 59-10-529 applies in District Court. Second, it ignores the expressed legislative declaration of purpose: "This act addresses only questions of access to the refund adjudication process caused by the timing of the Davis v. Michigan decision. It does not affect the merits of any pending or future refund litigation." 1990 Utah Laws ch. 21 § 2 (emphasis added). This legislation granted Plaintiffs the opportunity to have their claims for 1985 examined at the Tax Commission in spite of the twenty day window between the announcement of Davis and the filing date. The legislature made no statement about whether Plaintiffs' claim for refund of an allegedly illegal tax is barred by a six month statute of limitations. The Legislature made no promises about the outcome of the action and expressly reserved all defenses.

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[9] See infra pp. 29-31 for the three types of income tax matters over which the District Court has jurisdiction.

The class as defined is overbroad. Only individuals paying their taxes under protest and bringing an action in District Court within six months can be included in it. The record supports a finding that some class members paid their 1988 taxes under protest, and brought suit for refund, and are properly before the District Court. All others must be excluded from the class. The District Court must be reversed.

B. Military Retirees Were Improperly Included Within the Class Because the Rule in Davis Does Not Apply to Them.

As set forth in Defendants' Opening Brief at 28-30, military retirees should not have been included within the class definition. This argument was supported by federal case law. State supreme courts are split on this issue. See Barker v. Kansas, 815 P.2d 46 (Kan. 1991) (federal military retirees are denied refunds in Davis litigation). Contra Kuhn v. Dept. of Revenue, 817 P.2d 101 (Colo. 1991); Pledger v. Bosnick, 811 S.W.2d 286 (Ark. 1991). This issue is now pending before the U.S. Supreme Court. Barker v. Kansas, 815 P.2d 46 (Kan. 1991), cert. granted, 112 S.Ct. 576 (1991).

Plaintiffs have made no effort to distinguish the rationale that underlies the federal cases cited in Defendants' Opening Brief. Instead, they claim "[i]t is clear Congress, in passing the USFSPA [Uniform Services Former Spouses Protection Act], viewed military retirement pay as exactly that, retirement pay, and not reduced pay for reduced services." (Plaintiffs'

Opening Brief at 89.) However, they fail to provide any legislative history in support of this assertion. Nor do they cite case law supporting clear congressional intent.

Plaintiffs argue that USFSPA overrules the proposition that military pay is reduced pay for reduced services. However, § 1408(c)(1) (1983) provides:

> A court may treat disposable retired or retainer pay payable to a member for pay periods beginning after January 25, 1991, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This supports a finding that this statute allows a state the opportunity to decide how it will treat marital assets in a divorce proceeding. It fails to state how military benefits should be treated outside of divorce proceedings. This Court should consider the case law and reasoning presented in Defendants' Opening Brief. It establishes that military retirees receive reduced pay for reduced services. Consequently, the Davis decision does not apply to them as no comparable class of retirees from the State of Utah received reduced pay for reduced services. The District Court's inclusion of military retirees in the class definition should be reversed.

C. The Class Definition is Overbroad Because Plaintiffs Have Admitted They Can Not Prevail Under Any Theory For the 1984 Year.

Plaintiffs argue: "[t]hough initially included in the class, 1984 taxpayers have no valid claim to a refund and were

excluded from the final class definition." (Plaintiffs' Opening Brief at 84.) They cite to the final order. However, the portion of the order referenced is the statement of facts. This fails to redefine the class. Consequently, the order defining the class should be reversed.

POINT IV

THE DISTRICT COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS AND IN GRANTING INJUNCTIVE RELIEF.

A. The District Court Erred in Determining that the Tax Commission had Rendered a Final Decision When Only the Auditing Division had Examined the Issues Raised in Davis.

Defendants moved to dismiss arguing that Plaintiffs had not exhausted administrative remedies. This request was denied. Plaintiffs contend that the Commission's position on granting refunds was clear. (See Plaintiffs' Opening Brief at 66, 76.) However, the Utah Individual Income Tax Act Provides:

> The commission's action on a claim for refund is final 90 days after the date of mailing of the commission's notice of agency action for taxpayers within the state, or 150 days after the mailing of the commission's notice of agency action for taxpayers outside the states of the union and the District of Columbia, unless the taxpayer files a petition for redetermination of the action with the commission before the expiration of those periods.

Utah Code Ann. § 59-10-532 (1987) (emphasis added). Consequently, the Commission's action could not be final because taxpayers had actions pending before it. There could be no final

determination of the applicability of Davis prior to final agency action by the Commission.

B. Declaratory Judgment is a Remedy, Not a Grant of Jurisdiction.

Plaintiffs argue that the District Court had jurisdiction under the declaratory judgment statute. (See Plaintiffs' Opening Brief at 67-70.) They contend that Defendants' reasoning that Declaratory Judgment is not jurisdictional is "circuitous." (Plaintiffs' Opening Brief at 68 n.38.)

This Court in Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983) (emphasis added) reasoned:

> The statutory creation of relief in the form of a declaratory judgment does not create a cause of action or grant jurisdiction to the court where it would not otherwise exist. the Utah Declaratory Judgment Statute merely authorizes a new form of relief, which in some cases will provide a fuller and more adequate remedy than that which existed under the common law. Gray v. Defa, 103 Utah 339, 135 P.2d 251 (1943).

Accordingly, the District Court's independent basis for jurisdiction was for 1988 only.

C. Before the District Court Could Rule that Plaintiffs Need Not Exhaust Administrative Remedies, It Must Have Had Jurisdiction to Hear the Case.

The Utah Constitution gives the Tax Commission authority to supervise and administer the tax laws of the state. See Utah Const. Art. XIII § 11. The Utah Supreme Court has also

found: "The [tax] commission has general supervision over the tax laws of the state . . . ." Board of Equalization of Kane County v. Tax Comm'n, 50 P.2d 418, 422 (Utah 1935); see also Baker v. Tax Comm'n, 520 P.2d 203, 206 (Utah 1974) (plurality opinion cites Board of Equalization of Kane County v. Tax Comm'n with approval). The Legislature has also granted identical supervisory and administrative authority to the Tax Commission. See Utah Code Ann. § 59-1-210(5) (1987). Utah District Courts have jurisdiction "except as limited by [the] constitution or by statute . . . ." Utah Const. Art. VIII § 5 (1991). The Utah Supreme Court has declared: "[T]he legislature may define and prescribe the forum in which actions may or must be commenced . . . ." State v. Johnson, 114 P.2d 1034, 1039 (Utah 1941). Accordingly, the Legislature properly granted jurisdiction to the Tax Commission over income tax matters.

The Utah State Individual Income Tax Act provides: "The commission shall administer and enforce the tax herein imposed . . . ." Utah Code Ann. § 59-10-544 (1987). Consequently, the Legislature has granted jurisdiction to the State Tax Commission to administer and enforce all laws dealing with state income tax.

The District Court has jurisdiction over only three types of income tax cases:

1. Petitions for Writ of Mandate may be brought in District Court to compel a taxpayer to file individual income tax

returns. Utah Code Ann. § 59-1-707 (1987).

2. The Tax Division of the District Court has appellate jurisdiction over Tax Commission decisions rendered in informal proceedings. Utah Code Ann. § 59-1-601(1)(b) (1987).

3. District Court has jurisdiction for taxes alleged to be illegal and paid under protest.[10] Utah Code Ann. § 59-1-301 (1987).

None of these jurisdictional provisions are applicable in this case except for 1988 taxes paid under protest. Consequently, the District Court lacked jurisdiction to hear the refund claims brought under the "overpayment" statute.

D. The District Court Could Not Have Issued a Writ of Mandamus Requiring Plaintiffs to Act Where an Injunction was in Place Barring Them from Acting.

Plaintiffs argue that the District Court had jurisdiction pursuant to a petition for writ of mandamus. (See Plaintiffs' Opening Brief at 70.) A writ of mandamus does not grant the court jurisdiction where it does not exist. Cf. Terracor v. Board of State Lands, 716 P.2d 796 (Utah 1986) (Mandamus cannot issue if a party lacks standing.)

There is nothing in the record showing Plaintiffs ever

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[10] Where a party challenges the legality or the constitutionality of a statute, the exclusive remedy is "payment under protest in compliance with" statutory procedures. See Shea v. Tax Comm'n, 120 P.2d 274, 275 (Utah 1941). Unless these procedures are followed, the taxpayer must seek an administrative remedy and seek review by the Utah Supreme Court. See Utah Code Ann. § 78-2-2(3)(e)(ii) (Supp. 1991 & 1987).

petitioned the Court for a writ of mandamus. However, even if they had petitioned for mandamus, it is unjustified in this case.

A writ of mandamus is only appropriate where an inferior tribunal has "exceeded its jurisdiction or abused its discretion." Dorge v. Court of Appeals, 762 P.2d 347 (Utah 1988). The Commission did neither. First, it was enjoined by the District Court prior to ever being able to act. (R. 267.)

The general rule is:

> Since the appropriate function of mandamus is to compel the performance of duties imposed upon the respondent by law, and not to coerce acts which the law prohibits, it would seem that the relief ought not to be granted to enforce the doing of an act which has been expressly forbidden by injunction . . .

State v. Shipton, 286 P.2d 601, 602 (Wyo. 1955) (quoting, 34 Am.Jur., Mandamus, § 77).

Second, it cannot be argued that the Commission abused its discretion where there was no clear legal requirement for issuing tax refunds. In order to issue a writ of mandamus, the law must not only authorize the demanded action but require it; and the duty must be clear and undisputable. LeBeau v. State, 377 P.2d 302 (Wyo. 1963). There was no clear requirement to issue refunds. Consequently, the District Court was without jurisdiction to issue a writ of mandamus.

POINT V

FEES AND COSTS WERE INCORRECTLY AWARDED.

Plaintiffs argue that they are entitled to fees and a costs under two theories. Their first theory is that damages are proper under a § 1983 civil rights claim. That claim was dismissed and the correctness of that decision is addressed at Point VI. Second, Plaintiffs claim that the trial court issued a writ of mandamus, and as a result of that order costs and attorneys fees are properly assessed. As discussed above, there is no basis for mandamus. Therefore, fees and costs were improperly awarded.

POINT VI

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE 42 U.S.C. § 1983 CLAIM.

Introduction

In reviewing a dismissal under Utah R. Civ. P. 12 (b)(6), this Court accepts the factual allegations in the complaint as true and considers all reasonable inferences to be drawn therefrom in the light most favorable to the Plaintiffs. St. Benedict's Dev. Co. v. St Benedict's Hospital, 811 P.2d 194 (Utah 1991). A motion to dismiss is appropriate where it is clear that the Plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim. Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990).

The District Court was correct in dismissing Plaintiffs' § 1983 claim. Plaintiffs' allegations of illegal exaction and retention of taxes are legal conclusions, not facts. A cause of action under § 1983 is viable only if the Defendants' reliance on existing law was unreasonable and violated clearly established statutory or Constitutional rights. Because right to refunds for any year had been established at the time Plaintiffs' brought their claims, Defendants' actions were not in violation of "a clearly established right of which a reasonable person would have known." Thus, a viable § 1983 claim cannot be supported.

The State and the Tax Commission are not "persons" under the language of § 1983 and therefore are not subject to a § 1983 claim for damages in state court.

Plaintiffs' allegations of individual liability against the Tax Commissioners and the Commission Director are really official capacity claims. All allegations of wrongdoing here are related to each Defendant's office because Plaintiffs claim they reasonably relied on the public statements of individual Tax Commission members. There is no claim that the State officials acted for their own benefit outside their official capacities.

Even if this is an individual capacity claim, the individual Defendants are entitled to qualified immunity. Defendants' conduct did not violate clearly established rights. A right to refunds was not clearly established at the time.

Thus, Defendants in their individual capacities are entitled to qualified immunity. The District Court correctly dismissed the § 1983 claim on immunity grounds.

A. Plaintiffs' Allegations Fail to Support a § 1983 Claim on Which Relief can be Granted.

Plaintiffs' complaint attempts to characterize as "factual allegations" what really are Plaintiffs' legal conclusions. Plaintiffs allegations of illegal exaction and retention of taxes are legal conclusions, not facts. At the time the complaint was filed, no clear right to refunds existed. It is axiomatic that where no clear right existed, Defendants could not have knowingly violated such a right. Thus, no viable § 1983 cause of action exists.

Plaintiffs assert their § 1983 claim based upon an alleged violation of rights under 42 U.S.C. § 111 and the U.S. Constitution because of the preferential treatment given to state retirees. Utah's taxation scheme had existed for many years and was presumptively valid. See State v. Davis, 787 P.2d 517, 519 (Utah App. 1990); see also Greaves v. State, 528 P.2d 805, 806-07 (Utah 1974) (Legislative enactments are presumed valid).

The statutes and rules applicable to tax assessment and collection for tax years 1985 through 1988 were fixed on December 31st at the close of each tax year. At the close of these tax years, two things were clear: (1) The taxation of federal retirees was lawful; and (2) Utah's tax statutes exempting state

retirees while taxing all others was permissible. The State's reliance on long established and unchallenged state law was reasonable. At the time the actions complained of took place, they were lawful.

A cause of action under § 1983 is viable only if the State's reliance on existing law was unreasonable and violated clearly established statutory or constitutional rights.[11] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The State's actions do not provide the basis for a § 1983 claim.

B. The State and its Agencies are Entitled to Sovereign Immunity, and State Officials in Their Official Capacities are Immune from Damages Under § 1983.

The Supreme Court in Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, (1989), held that a state is not a "person" under § 1983 and is not subject to a state court claim for damages in a § 1983 action. Id. at 63. A state is granted sovereign immunity in its own courts. Id. at 69. Thus, under Will, Plaintiffs' § 1983 claim against the State and the State Tax Commission was properly dismissed.

The Will Court further found that a suit against state

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[11] 4 U.S.C. § 111 creates no enforceable rights under § 1983 because intergovernmental immunity claims are not "rights, privileges, or immunities" within the meaning of § 1983. See Wright v. Roanoke Redevelopment and Housing, 479 U.S. 418, 107 S. Ct. 766 (1987). The statute "being grounded not on individual rights but instead on considerations of power -- will not support an action under § 1983." Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1394 (9th Cir. 1987).

officials in their official capacities is really a suit against the officials' offices and is no different from a suit against the state itself. Id. at 71. Accordingly, the § 1983 claim against the Tax Commissioners and Director in their official capacities was properly dismissed on sovereign immunity grounds.[12]

Plaintiffs cite Dennis v. Higgins, 111 S.Ct. 865 (1991), which provides a § 1983 cause of action against state taxing officials for injunctive and declaratory relief for clear violations of the Commerce Clause. However, Dennis does not authorize a damages remedy. Moreover, Dennis does not overrule the immunity doctrines discussed above. Dennis only provided for a § 1983 claim for violations of the Commerce Clause.

Plaintiffs argue, in a partial quote from Justice Kennedy's dissent (without identifying it as such), that Plaintiffs are entitled to sue for monetary damages here under § 1983. (Plaintiffs' Opening Brief at 94.) Dennis is not so far reaching. The Dennis dissenters urge that the Court must "distinguish between those constitutional provisions which secure the rights of persons vis-a-vis the States, and those provisions which allocate power between the Federal and State Governments. The former secure rights within the meaning of § 1983, but the

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[12] Hafer v. Melo, 112 S.Ct. 358 (1991) recently clarified Will. Hafer limited Will's sovereign immunity holding where state officials are sued in their individual capacities. See Section D, infra, for discussion of Hafer's impact.

latter do not." Id. at 873. According to the dissenters, intergovernmental tax immunity provided by 4 U.S.C § 111 and the U.S. Constitution is not a right protected by § 1983; rather, intergovernmental tax immunity is a classic example where the provisions are only intended to allocate power between the federal and state governments, i.e. allocation of tax authority. In fact, the dissent states that "[T]here is no textual or other support for holding that § 1983 imposes such far reaching liabilities upon the States." Id. at 879.

Even if a § 1983 cause of action were to exist here, official capacity Defendants, under Will, are still immune from Plaintiffs' § 1983 claim for monetary damages. The District Court was correct in dismissing the § 1983 claim on immunity grounds.

C. Plaintiffs' Allegations of Individual Liability are Really Disguised Official Capacity Claims.

Although Plaintiffs say the individual Defendants are named in this action as individuals, the Defendants are in reality being sued in their official capacities. An official capacity action is distinguished from an individual capacity lawsuit by the substance of the claim. Official capacity suits involve the policy or custom of a government entity. Kentucky v. Graham, 473 U.S. 159, 165-167 (1985). In official capacity actions, the office of the individual defendant is related to the alleged improper conduct. Id. The Seventh Circuit Court of

Appeals explained the official capacity concept as follows:

> If the [plaintiff's] theory is that the defendant occupied a given office, and the occupant of the office had a duty (one attaching to any occupant of the office) to do such and such, then we have an "official capacity" suit . . . . If the theory is that the defendant did something that is tortious [sic] independent of the office the defendant holds, we have an "individual capacity" suit.

Walker v. Rowe, 791 F.2d 507, 508 (7th Cir. 1986).

In the instant case, Plaintiffs state in the Amended Complaint that the individual Defendants are being sued as individuals. However, this unsupported characterization does not dispose of the question. The substance of the claim is determinative, and the Plaintiffs' allegations demonstrate that the individuals are sued in their official capacities.

The Graham and Walker courts held that an official capacity suit alleges misconduct related to a Defendant's office and to policy issuing therefrom. In this case, Plaintiffs have done just that. The Amended Complaint states that the individual Defendants have taken an illegal position concerning the taxation of federal pensions and have misrepresented the law on such tax. (Amended Complaint, paragraphs 15-18, 29-32, 45-47.) These are official capacity acts because they involve statements of Utah Tax Commission policy. Moreover, the acts are related to each Defendant's office because Plaintiffs claim they reasonably relied on the public statements of the individual Tax Commission

members. (Id. at 45-47.) There is no allegation of an act independent of the individuals' offices, and no claim that the state officials acted for their own benefit outside their official capacities. This is an official capacity action, therefore, and was properly dismissed under the Will holding.

D. If This is an Individual Capacity Case, the Individual Defendants are Entitled to Qualified Immunity with Respect to Plaintiffs' § 1983 Claim for Monetary Damages.

Defendants do not concede that this is a proper individual capacity case. However, even if it is, the individual Defendants have qualified immunity. Hafer v. Melo, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), cited by Plaintiffs, recently clarified the official and individual capacity dichotomy. Hafer was a "capacity" case; it was not a qualified immunity case. Hafer merely said that a defendant cannot convert a valid individual capacity suit to an official capacity suit. The Court granted certiorari to "address the question whether state officers may be held personally liable for damages under § 1983 based upon actions taken in official capacities." Id. at 361. The court said:

> Summarizing our holding, [in Will] we said: "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."
>
> . . .
>
> State officers sued for damages in their official capacity are not "persons" for

> purposes of the suit because they assume the identity of the government that employs them. Ibid. By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person."

Id. at 362. Although state officers in their individual capacities are subject to a § 1983 monetary relief claim, the Court made clear that qualified personal immunity may still attach to those individuals:

> While the plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom," officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.

Id. at 362, (citation omitted, emphasis added).

Government officials who reasonably rely on existing law while performing discretionary functions are immune if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." Davis v. Scherer, 468 U.S. 183, 197 (1984), reh'g denied, 468 U.S. 1226 (1984).

The Supreme Court recently elaborated on the Harlow standard and made it clear that not only the right but also the unlawfulness of the official's conduct in light of that right must be clearly established to overcome qualified immunity.

> The contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of the preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted). Reasonable grounds existed for Defendants' actions. The plain language of 4 U.S.C. § 111 was not such that tax officials would have known that Utah's disparate tax treatment of state and federal pensions violated the law. Even the Justices of the Supreme Court could not agree that the right defined in Davis was clearly established before Davis. It would be inappropriate to expect the individual Defendants to have such discernment. Further, because Davis did not mandate refunds, Defendants failure to sua sponte issue refunds after March 28, 1989 cannot be characterized as action "that had previously been held unlawful." Id. Many state court decisions on the Davis issue have different outcomes. Tax refund claims based upon retroactive application of Davis are not a clearly established right. Accordingly, the individual Defendants have qualified

immunity.

Faced with similar facts and the same question presented here, the Fourth Circuit Court of Appeals in Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), cert. denied, 60 U.S.L.W. 3475 (January 13, 1992), held that because the law was not clearly established when Davis was decided, the State Revenue Secretary was entitled to qualified immunity from suit under § 1983 for pre and post-Davis actions. Id. at 966. The court reasoned that although public officials are "charged with knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law." Id. at 968 (quoting Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989)). Powers' good faith adherence to the state's procedural statutes regarding refunds, and reliance on the advice of North Carolina's Attorney General entitled her to immunity for pre and post-Davis tax collection. Id. at 971-973. (See also Duffy v. Wetzler, No. 90-07800 (N.Y. App. Div., January 15, 1992) (qualified immunity provided a basis for rejecting § 1983 claims); see also Lemon v. Kurtzman, 411 U.S. 192, 207-09 (1973) (except under extraordinary circumstances, liability will not attach for executing the statutory duties one was appointed to perform).

The individual Defendants in this case are likewise entitled to qualified immunity from liability for pre and post-Davis actions. Like the Defendants in Swanson and Duffy, the Tax Commissioners and Director reasonably relied upon existing law.

The outcome of Davis was not clearly foreshadowed, and the issue of refunds was not addressed by the Davis Court. Plaintiffs' asserted right to refunds was not clearly established at the time they filed their complaint. Thus, the Defendants' conduct did not contravene clearly established statutory or constitutional rights. The Defendants are entitled to qualified immunity and the District Court's dismissal of § 1983 claims should be upheld.

E. Dismissal of § 1983 Claims Should be Sustained Due to Plaintiffs' Failure to Exhaust Administrative Remedies.

Plaintiffs' refusal to allow the Commission to adjudicate refund claims and possibly afford the relief sought by some Plaintiffs under § 59-10-529 should preclude the § 1983 claims in District Court. Plaintiffs who were successful in enjoining the State from proceeding administratively with refund claims should not be allowed to shortcut exhaustion requirements and thereafter prosecute a § 1983 claim, which is essentially a refund claim under another name, against those whom they have enjoined.

The Oregon Supreme Court in its post-Davis decision, Nutbrown v. Munn, 811 P.2d 131 (Or. 1991) cert. denied, 112 S.Ct. 867 (1992), held that § 1983 claims against state tax officials in their individual capacities were properly dismissed based on the taxpayers' failure to exhaust state administrative remedies. Id. at 143. The court rejected taxpayers' argument that

administrative remedies were inadequate and futile. The court said:

> If Taxpayers exhaust their administrative remedies and, in the process, obtain the relief under the Oregon personal income tax laws that they seek, the need for this § 1983 litigation vanishes. That is a sufficient reason to require exhaustion.

Id., at 142-143 (footnote omitted).

The Wisconsin Supreme Court recently addressed this same issue. In Hogan v. Musolf, 471 N.W.2d 216, 217 (Wis. 1991), cert. denied, 112 S.Ct. 867 (1992) the court held that taxpayers were required to exhaust administrative remedies before commencing a § 1983 action, and noted that its holding was consistent with other states' views. The court said:

> [T]he retirees' inability to obtain damages from the defendants in their individual capacities does not make the exhaustion requirement futile. The damages claimed against the defendants in their individual capacities are essentially a refund claim under a different name. The state's refund procedure adequately addresses these claims. Until that remedy is exhausted, "damages" are irrelevant. The defendants should, as McNary, 454 U.S. at 114, 102 S.Ct. at 185, suggests, be permitted to "rectify any alleged impropriety" through the state's procedure.

Id. at 224 (emphasis added).

Here, as in Oregon and Wisconsin, Plaintiffs sought to avoid administrative procedures. In this case, Plaintiffs were successful in enjoining the Defendants from making determinations on claims for refund. (R. 367.) Yet, Plaintiffs' claim for §

1983 damages is essentially a refund claim under another name.[13] The Defendants should be permitted to rectify any alleged impropriety before suffering a § 1983 state court action. Therefore, consistent with the Nutbrown and Hogan reasoning, Plaintiffs' failure to exhaust administrative remedies supports dismissal of their § 1983 claim.

RELIEF REQUESTED

This Court should enter an order as follows:

1. The Class should be redefined to include only Plaintiffs who have followed the procedures of Utah Code Ann. § 59-1-301 (1987). It is the remedy for alleged illegal taxes. Only those Plaintiffs making payment of taxes under protest and suing in District Court within six months are properly before the

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[13] But for the injunction, Defendants would have adjudicated the refund claims. In their "quasi-judicial" capacity, the individual Defendants would have been absolutely immune from § 1983 damages liability. The Supreme Court in Butz v. Economou, 438 U.S. 478, 514 (1978) granted absolute immunity to officials performing adjudicatory functions within an agency. While qualified immunity from liability for damages is the general rule applicable to executive department officials, there are certain functions performed by such officials that require complete, absolute immunity. Administrative adjudication shares enough of the characteristics of the judicial process that participants are given absolute immunity from suits for damages. Id. at 513. (See also, Horwitz v. Board of Medical Examiners of State of Colorado, 822 F.2d 1508 (10th Cir. 1987), cert. denied, 484 U.S. 964 (1987) (Absolute immunity which affords complete protection from liability for damages, defeats suit at outset.) Plaintiffs should not be allowed to circumvent well founded judicial policy affording Defendants absolute immunity because they succeeded in enjoining Defendants from adjudicating refund claims.

District Court. The record supports a finding that some Plaintiffs paid their 1988 taxes under protest and brought suit within the prescribed time. The class should be limited to those persons.

2. The rule in Davis does not apply to federal military retirees. Because military retirement pay is current compensation, it is fundamentally different from the pensions which were exempt from Utah income tax. There was no comparable class of state retirees who received current pay for reduced services. They should be excluded from the class definition.

3. Utah Code Ann. § 59-10-529 is an administrative remedy. It is not applicable in this case. It is unavailable in the District Court.

4. The Chevron retroactivity doctrine governs this case. Davis is a new rule of law; therefore, pursuant to American Trucking Ass'n v. Smith, 110 S.Ct. 2323, 2336 (1990) (Plurality Opinion), "prospective application of a new rule of law begins on the date of the decision announcing the principle." That date is March 28, 1989. Because tax liability for 1988 was fixed on December 31, 1988, the rule in Davis does not apply to the 1988 tax year or prior years. The Legislature made the Davis rule fully operative for tax year 1989.

5. The District Court correctly dismissed Plaintiffs' 42 U.S.C. § 1983 claim. Plaintiffs' Complaint attempted to characterize as factual allegations what in reality were legal

conclusions. No right to income tax refunds existed. The Tax Commission, the State, and Tax Commission Officers are entitled to sovereign immunity in their official capacities and to qualified immunity in their individual capacities.

6. Fees and costs were incorrectly awarded. First, Plaintiffs' § 1983 claim was properly dismissed. Consequently § 1983 provides no basis for fees and costs. Second, Plaintiffs failed to petition the District Court for a writ of mandamus. Even if they had petitioned for the writ, it would be improper in this case. Consequently, the awarding of fees and costs was improper.

If this Court determines that the rule of law in Davis applies for tax years 1985-1988, it should reverse the remedy crafted by the District Court. This Court should weigh heavily the benefit that State retirees received prior to Davis. State retirees received 8.3 million dollars in tax exemptions for tax years 1985-1988. Any relief granted Plaintiffs should be based on this amount received by state retirees for the same period.

Respectfully submitted this 2nd day of March, 1992.

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by _____
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by _____
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CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 2nd day of March, 1992, four copies of the foregoing Reply Brief of Defendants and Response to Plaintiffs' Cross-Appeal were hand delivered to:

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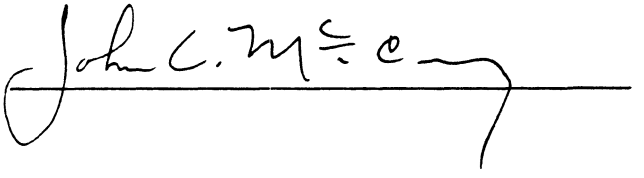

APPENDIX 1

than report without them? Third, the Court suggests that misquotations that do not materially alter the meaning inflict no injury to reputation that is compensable as defamation. *Ante*, at 2433. This may be true, but this is a question of defamation or not, and has nothing to do with whether the author deliberately put within quotation marks and attributed to the speaker words that the author knew the speaker did not utter.

As I see it, the defendants' motion for summary judgment based on lack of malice should not have been granted on any of the six quotations considered by the Court in Part III-B of its opinion. I therefore dissent from the result reached with respect to the "It Sounded Better" quotation dealt with in paragraph (c) of Part III-B, but agree with the Court's judgment on the other five misquotations.

JAMES B. BEAM DISTILLING COMPANY, Petitioner

v.

GEORGIA et al.

No. 89-680.

Argued Oct. 30, 1990.

Decided June 20, 1991.

Distiller brought action to recover $2.4 million in excise taxes that had been paid under Georgia excise tax statute that imposed greater tax on imported alcoholic beverages than was imposed on liquor manufactured from Georgia-grown products. The Fulton Superior Court, Ralph H. Hicks, J., determined that statute violated commerce clause but that its ruling would only be applied prospectively, and distiller appealed. The Georgia Supreme Court, 259 Ga. 363, 382 S.E.2d 95, affirmed, and distiller petitioned for certiorari. The Supreme Court, Justice Souter, held that prior ruling invalidating similar Hawaii tax scheme applied retroactively to present claim arising out of facts antedating that decision.

Reversed and remanded.

Justice White filed decision concurring in judgment.

Justice Blackmun filed opinion concurring in judgment, in which Justices Marshall and Scalia joined.

Justice Scalia filed opinion concurring in judgment in which Justices Marshall and Blackmun joined.

Justice O'Connor filed dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

1. Courts ⇐100(1)

When Supreme Court has applied rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. (Per Souter, J., with one Justice concurring and four Justices concurring in judgment.)

2. Courts ⇐100(1)

Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, that Hawaii statute imposing greater excise tax on imported alcoholic products than was imposed on local alcoholic products violated commerce clause, applied retroactively to similar Georgia excise tax statute being challenged in action arising out of facts antedating that decision. (Per Souter, J., with one Justice concurring and four Justices concurring in judgment.) O.C.G.A. § 3-4-60; U.S.C.A. Const. Art. 1, § 8, cl. 3.

Syllabus

Before 1985, Georgia law imposed an excise tax on imported liquor at a rate

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*,

double that imposed on liquor manufactured from Georgia-grown products. In 1984, this Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200, held that a similar Hawaii law violated the Commerce Clause. Petitioner, a manufacturer of Kentucky Bourbon, thereafter filed an action in Georgia state court, seeking a refund of taxes it paid under Georgia's law for 1982, 1983, and 1984. The court declared the statute unconstitutional, but refused to apply its ruling retroactively, relying on *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, which held that a decision will be applied prospectively where it displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. The State Supreme Court affirmed.

Held: The judgment is reversed, and the case is remanded.

259 Ga. 363, 382 S.E.2d 95 (Ga.1989), reversed and remanded.

Justice SOUTER, joined by Justice STEVENS, concluded that once this Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. Pp. 2442–2448.

(a) Whether a new rule should apply retroactively is in the first instance a matter of choice of law, to which question there are three possible answers. The first and normal practice is to make a decision fully retroactive. Second, there is the purely prospective method of overruling, where the particular case is decided under the old law but announces the new, effective with respect to all conduct occurring after the date of that decision. Finally, the new rule could be applied in the case in which it is pronounced, but then return to the old one with respect to all others arising on facts predating the pronouncement. The possibility of such modified, or selective, prospectivity was abandoned in the criminal context in *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649. Pp. 2442–2445.

(b) Because *Bacchus* did not reserve the question, and remanded the case for consideration of remedial issues, it is properly understood to have followed the normal practice of applying its rule retroactively to the litigants there before the Court. Pp. 2445–2446.

(c) Because *Bacchus* thus applied its own rule, principles of equality and *stare decisis* require that it be applied to the litigants in this case. *Griffith's* equality principle, that similarly situated litigants should be treated the same, applies equally well in the civil context as in the criminal. Of course, retroactivity is limited by the need for finality, since equality for those whose claims have been adjudicated could only be purchased at the expense of the principle that there be an end of litigation. In contrast, parties, such as petitioner, who wait to litigate until after others have labored to create a new rule, are merely asserting a right that is theirs in law, is not being applied on a prospective basis only, and is not otherwise barred by state procedural requirements. Modified prospectivity rejected, a new rule may not be retroactively applied to some litigants when it is not applied to others. This necessarily limits the application of the *Chevron Oil* test, to the effect that it may not distinguish between litigants for choice-of-law purposes on the particular equities of their claims to prospectivity. It is the nature of precedent that the substantive law will not shift and spring on such a basis. Pp. 2446–2447.

(d) This opinion does not speculate as to the bounds or propriety of pure prospectivity. Nor does it determine the appropriate remedy in this case, since remedial issues were neither considered below nor argued to this Court. P. 2448.

Justice WHITE concluded that, under any one of several suppositions, the opinion in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200, may reasonably read to extend the benefits of the judgment in that case to Bacchus Imports and that petitioner here should also have the benefit of *Bacchus*. If the Court in *Bacchus* thought that its decision was not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. The Court in that case may also have thought that retroactivity was proper under the factors set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. And, even if the Court was wrong in applying *Bacchus* retroactively, there is no precedent in civil cases for applying a new rule to the parties of the case but not to others. Moreover, *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649, has overruled such a practice in criminal cases and should be followed on the basis of *stare decisis*. However, the propriety of pure prospectivity is settled in this Court's prior cases, see, *e.g.*, *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647, which recognize that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. To allow for the possibility of speculation as to the propriety of such prospectivity is to suggest that there may come a time when this Court's precedents on the issue will be overturned. Pp. 2448–2449.

Justice BLACKMUN, joined by Justice MARSHALL and Justice SCALIA, concluded that prospectivity, whether "selective" or "pure," breaches the Court's obligation to discharge its constitutional function in articulating new rules for decision, which must comport with its duty to decide only cases and controversies. *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. The nature of judicial review constrains the Court to require retroactive application of each new rule announced. Pp. 2449–2450.

Justice SCALIA, joined by Justice MARSHALL and Justice BLACKMUN, while agreeing with Justice SOUTER's conclusion, disagreed that the issue is one of choice of law, and concluded that both selective and pure prospectivity are impermissible, not for reasons of equity, but because they are not permitted by the Constitution. To allow the Judiciary powers greater than those conferred by the Constitution, as the fundamental nature of those powers was understood when the Constitution was enacted, would upset the division of federal powers central to the constitutional scheme. Pp. 2450–2451.

SOUTER, J., announced the judgment of the Court, and delivered an opinion, in which STEVENS, J., joined. WHITE, J., filed an opinion concurring in the judgment. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL and SCALIA, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined.

Morton Siegel, Chicago, Ill., for petitioner.

Amelia W. Baker, Atlanta, Ga., for respondents.

Justice SOUTER announced the judgment of the Court, and delivered an opinion in which Justice STEVENS joins.

The question presented is whether our ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), should apply retroactively to claims arising on facts antedating that decision. We hold that application of the rule in that case requires its application retroactively in later cases.

I

Prior to its amendment in 1985, Georgia state law imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. See Ga.Code Ann. § 3–4–60 (1982). In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held in *Bacchus* to violate the Commerce Clause. *Bacchus, supra*, at 273, 104 S.Ct., at 3056. It proved no bar to our finding of unconstitutionality that the discriminatory tax involved intoxicating liquors, with respect to which the States have heightened regulatory powers under the Twenty-first Amendment. *Id.*, at 276, 104 S.Ct., at 3057.

In *Bacchus'* wake, petitioner, a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law likewise inconsistent with the Commerce Clause, and sought a refund of $2.4 million, representing not only the differential taxation but the full amount it had paid under § 3–4–60 for the years 1982, 1983, and 1984. Georgia's Department of Revenue failed to respond to the request, and Beam thereafter brought a refund action against the State in the Superior Court of Fulton County. On cross-motions for summary judgment, the trial court agreed that § 3–4–60 could not withstand a *Bacchus* attack for the years in question, and that the tax had therefore been unconstitutional. Using the analysis described in this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the court nonetheless refused to apply its ruling retroactively. It therefore denied petitioner's refund request.

The Supreme Court of Georgia affirmed the trial court in both respects. The court held the pre–1985 version of the statute to have violated the Commerce Clause as, in its words, an act of "simple economic protectionism." See 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) (citing *Bacchus*). But it, too, applied that finding on a prospective basis only, in the sense that it declined to declare the State's application of the statute unconstitutional for the years in question. The court concluded that but for *Bacchus* its decision on the constitutional question would have established a new rule of law by overruling past precedent, see *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939) (upholding predecessor to § 3–4–60 against Commerce Clause objection), upon which the litigants may justifiably have relied. See 259 Ga., at 365, 382 S.E.2d, at 96. That reliance, together with the "unjust results" that would follow from retroactive application, was thought by the court to satisfy the *Chevron Oil* test for prospectivity. To the dissenting argument of two justices that a statute found unconstitutional is unconstitutional *ab initio*, the court observed that while it had " 'declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, ... those decisions are not applicable to the present controversy, as the original ... statute, when adopted, was not violative of the Constitution under the court interpretations of that period.' " 259 Ga., at 366, 382 S.E.2d, at 97 (quoting *Adams v. Adams*, 249 Ga. 477, 478–479, 291 S.E.2d 518, 520 (1982)).

Beam sought a writ of certiorari from the Court on the retroactivity question.[1] We granted the petition, 496 U.S. ——, 110 S.Ct. 2616, 110 L.Ed.2d 637 (1990), and now reverse.

II

In the ordinary case no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. See Mishkin, Foreword: The High Court, The Great

1. Although petitioner expends some effort, see Brief for Petitioner 5–8, in asserting the unconstitutionality under *Bacchus* of the Georgia law as amended, see Ga.Code Ann. § 3–4–60 (1990), an argument rejected by the Georgia Supreme Court in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), that issue is neither before us nor relevant to the issue that is.

Writ, and the Due Process of Time and Law, 79 Harv.L.Rev. 56, 60 (1965). Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.

It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law, "a choice ... between the principle of forward operation and that of relation backward." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). Once a rule is found to apply "backward," there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see *McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div.*, 496 U.S. ——, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See *American Trucking Assns., Inc. v. Smith*, 496 U.S. ——, ——, 110 S.Ct. 2323, ——, 110 L.Ed.2d 148 (1990) (STEVENS, J., dissenting). But the antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise. See *Smith, supra*, at ——, 110 S.Ct., at —— (plurality opinion); cf. *United States v. Estate of Donnelly*, 397 U.S. 286, 297, n., 90 S.Ct. 1033, 1039, n., 25 L.Ed.2d 312 (1970) (Harlan, J., concurring).

As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm, see *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (Holmes, J., dissenting), and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. See *Mackey v. United States*, 401 U.S. 667, 679, 91 S.Ct. 1160, 1173, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It also reflects the declaratory theory of law, see *Smith, supra*, at ——, 110 S.Ct., at —— (1990) (SCALIA, J., concurring in judgment); *Linkletter v. Walker*, 381 U.S. 618, 622–623, 85 S.Ct. 1731, 1733–1734, 14 L.Ed.2d 601 (1965), according to which the courts are understood only to find the law, not to make it. But in some circumstances retroactive application may prompt difficulties of a practical sort. However much it comports with our received notions of the judicial role, the practice has been attacked for its failure to take account of reliance on cases subsequently abandoned, a fact of life if not always one of jurisprudential recognition. See, *e.g.*, *Mosser v. Darrow*, 341 U.S. 267, 276, 71 S.Ct. 680, 684, 95 L.Ed. 927 (1951) (Black, J., dissenting).

Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision. This Court has, albeit infrequently, resorted to pure prospectivity, see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *Northern Pipeline Construction Co. v. Marathon Pipe Line*

Co., 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142–143, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964); see also *Smith*, *supra*, at ——, n. 11, 110 S.Ct., at 2354, n. 11 (STEVENS, J., dissenting); *Linkletter*, *supra*, 381 U.S., at 628, 85 S.Ct., at 1737, although in so doing it has never been required to distinguish the remedial from the choice-of-law aspect of its decision. See *Smith*, *supra*, at ——, 110 S.Ct., at —— (STEVENS, J., dissenting). This approach claims justification in its appreciation that "[t]he past cannot always be erased by a new judicial declaration," *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940), see also *Lemon v. Kurtzman*, 411 U.S. 192, 199, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151 (1973) (plurality opinion), and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness. But this equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures. See *United States v. Johnson*, 457 U.S. 537, 554–555, 102 S.Ct. 2579, 2589–2590, 73 L.Ed.2d 202 (1982); *James v. United States*, 366 U.S. 213, 225, 81 S.Ct. 1052, 1058, 6 L.Ed.2d 246 (1961) (Black, J., dissenting).

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. See, e.g., *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); *Daniel v. Louisiana*, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975); see also *Smith*, *supra*, at ——, 110 S.Ct., at —— ("During the period in which much of our retroactivity doctrine evolved, most of the Court's new rules of criminal procedure had expanded the protections available to criminal defendants"). On the one hand, full retroactive application of holdings such as those announced in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); and *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), would have "seriously disrupt[ed] the administration of our criminal laws[,] ... requir[ing] the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson*, *supra*, 384 U.S., at 731, 86 S.Ct., at 1780. On the other hand, retroactive application could hardly have been denied the litigant in the law-changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.

But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. See R. Wasserstrom, The Judicial Decision 69–72 (1961). "We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Desist v. United States*, 394 U.S. 244, 258–259, 89 S.Ct. 1030, 1039, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting); see also Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv.L.Rev. 409, 425 (1924). For this reason, we abandoned the possibili-

ty of selective prospectivity in the criminal context in *Griffith v Kentucky*, 479 U S 314, 328, 107 S Ct 708, 716, 93 L Ed 2d 649 (1987), even where the new rule constituted a "clear break" with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review Though *Griffith* was held not to dispose of the matter of civil retroactivity, see *id*, at 322, n 8, 107 S Ct, at 712, n 8, selective prospectivity appears never to have been endorsed in the civil context *Smith*, 496 U S, at ——, 110 S Ct, at —— (plurality opinion) This case presents the issue

III

[1, 2] Both parties have assumed the applicability of the *Chevron Oil* test, under which the Court has accepted prospectivity (whether in the choice-of-law or remedial sense, it is not clear) where a decision displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application See *Chevron Oil*, 404 U S, at 106–107, 92 S Ct, at 355 But we have never employed *Chevron Oil* to the end of modified civil prospectivity

The issue is posed by the scope of our disposition in *Bacchus* In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without the saying Although the taxpaying appellants prevailed on the merits of their Commerce Clause claim, however, the *Bacchus* Court did not grant outright their request for a refund of taxes paid under the law found unconstitutional Instead, we remanded the case for consideration of the State's arguments that appellants were "not entitled to refunds since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay" *Bacchus*, 468 U S, at 276–277, 104 S Ct, at 3058 "These refund issues, . . essentially issues of remedy," had not been adequately developed on the record nor passed upon by the state courts below, and their consideration may have been intertwined with, or obviated by, matters of state law *Id*, at 277, 104 S Ct, at 3058

Questions of remedy aside, *Bacchus* is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants then before the Court Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, compare *American Trucking Assns, Inc v Scheiner*, 483 U S 266, 297–298, 107 S Ct 2829, 2847–2848, 97 L Ed 2d 226 (1987) (remanding case to consider whether ruling "should be applied retroactively and to decide other remedial issues"), it is properly understood to have followed the normal rule of retroactive application in civil cases If the Court were to have found prospectivity as a choice-of-law matter, there would have been no need to consider the pass-through defense, if the Court had reserved the issue, the terms of the remand to consider "remedial" issues would have been incomplete Indeed, any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court See *McKesson*, 496 U S, at ——, 110 S Ct, at —— (pass-through defense considered as remedial question) Because the Court in *Bacchus* remanded the case solely for consideration of the pass through defense, it thus should be read as having retroactively applied the rule there decided [2] See also *Williams v*

2 In fact the state defendant in *Bacchus* argued for pure prospectivity under the criteria set forth in *Chevron Oil Co v Huson*, 404 U S 97 92 S Ct 349 30 L Ed 2d 296 (1971) See Brief for Appellee in *Bacchus Imports Ltd v Dias*, O T 1983 No 82-1565 p 19 It went on to argue that "*even if*" the challenged tax were held invalid *and* the decision were not limited to prospective application the challengers should not be entitled to refunds because any taxes paid would have been passed through to consumers *Id*, at 46 Though unnecessary to our ruling here the prospectivity issue can thus be said actually to have been litigated and by

Vermont, 472 U.S. 14, 28, 105 S.Ct. 2465, 2474, 86 L.Ed.2d 11 (1985); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196–197, 103 S.Ct. 2296, 2308–2309, 76 L.Ed.2d 497 (1983); cf. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817, 109 S.Ct. 1500, 1508, 103 L.Ed.2d 891 (1989).

Bacchus thus applied its own rule, just as if it had reversed and remanded without further ado, and yet of course the Georgia courts refused to apply that rule with respect to the litigants in this case. Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

Griffith cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. See *United States v. Estate of Donnelly*, 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring). Its strength is in fact greater in the latter sphere. With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings. See *Griffith*, *supra*, 479 U.S., at 331–332, 107 S.Ct., at 717–718 (WHITE, J., dissenting). Whereas *Griffith* held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). No such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments.

Nor is selective prospectivity necessary to maintain incentives to litigate in the civil context as it may have been in the criminal before *Griffith*'s rule of absolute retroactivity. In the civil context, "even a party who is deprived of the full retroactive benefit of a new decision may receive some relief." *Smith*, 496 U.S., at ——, 110 S.Ct., at ——. Had the petitioners in *Bacchus* lost their bid for retroactivity, for example, they would nonetheless have won protection from the future imposition of discriminatory taxes, and the same goes for the petitioner here. Assuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small number of cases; its possibility is therefore unlikely to deter the broad class of prospective challengers of civil precedent. See generally Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va.L.Rev. 201, 215 (1965).

Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas: why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? It is also objected that in civil cases unlike criminal there is more potential for litigants to freeload on those without whose labor the new rule would never have come into being. (Criminal defendants are already potential litigants by virtue of their offense, and invoke retroactivity only by way of defense; civil beneficiaries of new rules may become litigants as a result of the law change alone, and use it as a weapon.) That is true of the petitioner now before us, which did not challenge the Georgia law until after its fellow liquor

implication actually to have been decided by the Court by the fact of its consideration of the pass-through defense. See *Clemons v. Mississippi*, 494 U.S. ——, ——, n. 3, 110 S.Ct. 1441, 1448, n. 3, 108 L.Ed.2d 725 (1990).

distributors had won their battle in *Bacchus*. To apply the rule of *Bacchus* to the parties in that case but not in this one would not, therefore, provoke Justice Harlan's attack on modified prospectivity as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule." *Mackey*, 401 U.S., at 679, 91 S.Ct., at 1173 (Harlan, J., concurring in judgments in part and dissenting in part), see also *Smith*, *supra*, at ———, 110 S.Ct., at ——— (STEVENS, J., dissenting). Beam had yet to enter the waters at the time of our decision in *Bacchus*, and yet we give it *Bacchus*' benefit. Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.

As to the former, independent interests are at stake; and with respect to the latter, the distinction would be too readily and unnecessarily overcome. While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. " 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.' " *Federated Department Stores v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981) (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931)). Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time. As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant. We might, of course, limit retroactive application to those who at least tried to fight their own battles by litigating before victory was certain. To this possibility, it is enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. See *Simpson v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 681 F.2d 81, 85–86 (CA1 1982), cert. denied *sub nom. Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 459 U.S. 1127, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983); see also Note, 1985 U.Ill.L.Rev. 117, 131–132. Once retroactive application is chosen for any assertedly new rule, it is chosen for

all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases.

IV

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy ... may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. See *Estate of Donnelly*, 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring); cf. *Lemon*, 411 U.S., at 203, 93 S.Ct., at 1471.

The judgment is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice WHITE, concurring in the judgment.

I agree with Justice SOUTER that the opinion in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), may reasonably be read as extending the benefit of the judgment in that case to the appellant Bacchus Imports. I also agree that the decision is to be applied to other litigants whose cases were not final at the time of the *Bacchus* decision. This would be true under any one of several suppositions. First, if the Court in that case thought its decision to have been reasonably foreseeable and hence not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), would not then have been implicated. Second, even if retroactivity depended upon consideration of the *Chevron Oil* factors, the Court may have thought that retroactive application was proper. Here, it should be noted that although the dissenters in *Bacchus*—including Justice O'CONNOR—agreed that the Court erred in deciding the Twenty-first Amendment issue against the State, they did not argue that the Court erred in giving the appellant the benefit of its decision. *Bacchus*, *supra*, at 278, 104 S.Ct., at 3059 (STEVENS, J., dissenting). Third, even if—as Justice O'CONNOR now argues—the Court was quite wrong in doing so, *post*, at 2452-2456, that is water over the dam, irretrievably it seems to me. There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated,* and *Griffith v. Ken-*

* See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-143, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969); *Allen v.*

tucky, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), having overruled such a practice in criminal cases (a decision from which I dissented and still believe wrong, but which I now follow on the basis of *stare decisis*), I agree that the petitioner here should have the benefit of *Bacchus*, just as Bacchus Imports did. Hence I concur in the judgment of the Court.

Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. See, e.g., *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969). This was what Justice Stewart wrote for the Court in *Chevron Oil*, summarizing what was deemed to be the essence of those cases. *Chevron Oil, supra*, at 105–109, 92 S.Ct., at 355–357. This was also what Justice O'CONNOR wrote for the plurality in *American Trucking Assns., Inc. v. Smith*, 496 U.S. ——, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990). I joined that opinion and would not depart from it. Nor, without overruling *Chevron Oil* and those other cases before and after *Chevron Oil*, holding that certain decisions will be applied prospectively only, can anyone sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system.

Hence, I do not understand how Justice SOUTER can cite the cases on prospective operation, *ante*, at 2443, and yet say that he need not speculate as to the propriety of pure prospectivity, *ante*, at 2448. The propriety of prospective application of decision in this Court, in both Constitutional and statutory cases, is settled by our prior decisions. To nevertheless "speculate" about the issue is only to suggest that there may come a time when our precedents on the issue will be overturned.

Plainly enough, Justices SCALIA, MARSHALL, and BLACKMUN would depart from our precedents. Justice SCALIA would do so for two reasons, as I read him. *Post*, at ——. First, even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them. Second, Justice SCALIA, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.

I am quite unpersuaded by this line of reasoning and hence concur in the judgment on the narrower ground employed by Justice SOUTER.

Justice BLACKMUN, with whom Justice MARSHALL and Justice SCALIA join, concurring in the judgment.

I join Justice SCALIA's opinion because I agree that failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication. It seems to me that our decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), makes clear that this Court's function in articulating new rules of decision must comport with its duty to decide only "cases" and "controversies." See U.S. Const., Art. III, § 2, cl. 1. Unlike a legislature, we do not promulgate new rules to "be applied prospectively only," as the dissent, *post*, at 2450, and perhaps the Court,

State Bd. of Elections, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969), *Simpson v. Union Oil Co.*, 377 U.S. 13, 24–25, 84 S.Ct. 1051, 1058–1059, 12 L.Ed.2d 98 (1964), *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940).

would have it. The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a government of limited powers.

I do not read Justice SCALIA's comments on the division of federal powers to reject the idea expressed so well by the last Justice Harlan that selective application of new rules violates the principle of treating similarly situated defendants the same. See *Mackey v. United States*, 401 U.S. 667, 678–679, 91 S.Ct. 1160, 1172–1173, 28 L.Ed.2d 404 (1971), and *Desist v. United States*, 394 U.S. 244, 258–259, 89 S.Ct. 1030, 1038–1039, 22 L.Ed.2d 248 (1969) (dissenting opinion), on which *Griffith* relied. This rule, which we have characterized as a question of equity, is not the remedial equity that the dissent seems to believe can trump the role of adjudication in our constitutional scheme. See *post*, at 2451. It derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court. We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.

Application of new decisional rules does not thwart the principles of *stare decisis*, as the dissent suggests. See *post*, at 2452. The doctrine of *stare decisis* profoundly serves important purposes in our legal system. Nearly a half century ago, Justice Roberts cautioned: "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113, 64 S.Ct. 455, 463, 88 L.Ed. 561 (1944) (dissenting opinion). The present dissent's view of *stare decisis* would rob the doctrine of its vitality through eliminating the tension between the current controversy and the new rule. By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.

Like Justice SCALIA, I conclude that prospectivity, whether "selective" or "pure," breaches our obligation to discharge our constitutional function.

Justice SCALIA, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in the judgment.

I think I agree, as an abstract matter, with Justice SOUTER's reasoning, but that is not what leads me to agree with his conclusion. I would no more say that what he calls "selective prospectivity" is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.

If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to "tak[ing] Care that the Laws be faithfully executed," Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "[t]he Executive power" may be familiar to other legal systems, but is alien to our own. So also, I think, "[t]he judicial Power of the United States" conferred upon this Court and such inferior courts as Congress may

establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power "to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses "difficulties of a ... practical sort," *ante*, at 2443, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to "make new law," and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches.

For this reason, and not reasons of equity, I would find both "selective prospectivity" and "pure prospectivity" beyond our power.

Justice O'CONNOR, with whom Chief Justice REHNQUIST and Justice KENNEDY join, dissenting.

The Court extends application of the new rule announced in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), retroactively to all parties, without consideration of the analysis described in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Justice SOUTER bases this determination on "principles of equality and *stare decisis*." *Ante*, at ——. To my mind, both of these factors lead to precisely the opposite result.

Justice BLACKMUN and Justice SCALIA concur in the judgment of the Court but would abrogate completely the *Chevron Oil* inquiry and hold that all decisions must be applied retroactively in all cases. I explained last Term that such a rule ignores well-settled precedent in which this Court has refused repeatedly to apply new rules retroactively in civil cases. See *American Trucking Assns. v. Smith*, 496 U.S. ——, ——–——, 110 S.Ct. 2323, 2327–2343, 110 L.Ed.2d 148 (opinion of O'CONNOR, J.). There is no need to repeat that discussion here. I reiterate, however, that precisely because this Court has "the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)," *ante*, at 2450 (SCALIA, J., concurring), when the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. *Chevron Oil* describes our long-established procedure for making this inquiry.

I

I agree that the Court in *Bacchus* applied its rule retroactively to the parties before it. The *Bacchus* opinion is silent on the retroactivity question. Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.

The *Bacchus* Court erred in applying its rule retroactively. It did not employ the *Chevron Oil* analysis, but should have. Had it done so, the Court would have concluded that the *Bacchus* rule should be applied prospectively only. Justice SOUTER today concludes that, even in the absence of an independent examination of retroactivity, once the Court applies a new rule retroactively to the parties before it, it must thereafter apply the rule retroactively to everyone. I disagree. Without a determination that retroactivity is appropriate under *Chevron Oil*, neither equality nor *stare decisis* leads to this result.

As to "equality," Justice SOUTER believes that it would be unfair to withhold the benefit of the new rule in *Bacchus* to

litigants similarly situated to those who received the benefit in that case. *Ante*, at 2444, 2446. If Justice SOUTER is concerned with fairness, he cannot ignore *Chevron Oil;* the purpose of the *Chevron Oil* test is to determine the equities of retroactive application of a new rule. See *Chevron Oil, supra*, 404 U.S., at 107–108, 92 S.Ct., at 355–356; *Smith, supra*, at ——, 110 S.Ct., at ——. Had the *Bacchus* Court determined that retroactivity would be appropriate under *Chevron Oil*, or had this Court made that determination now, retroactive application would be fair. Where the *Chevron Oil* analysis indicates that retroactivity is not appropriate, however, just the opposite is true. If retroactive application was inequitable in *Bacchus* itself, the Court only hinders the cause of fairness by repeating the mistake. Because I conclude that the *Chevron Oil* test dictates that *Bacchus* not be applied retroactively, I would decline the Court's invitation to impose liability on every jurisdiction in the Nation that reasonably relied on pre-*Bacchus* law.

Justice SOUTER also explains that "*stare decisis*" compels its result. *Ante*, at 2446. By this, I assume he means that the retroactive application of the *Bacchus* rule to the parties in that case is itself a decision of the Court to which the Court should now defer in deciding the retroactivity question in this case. This is not a proper application of *stare decisis*. The Court in *Bacchus* applied its rule retroactively to the parties before it without any analysis of the issue. This tells us nothing about how this case—where the *Chevron Oil* question is squarely presented—should come out.

Contrary to Justice SOUTER's assertions, *stare decisis* cuts the other way in this case. At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law. See, *American Trucking, supra*, at ——-——, 110 S.Ct., at 2341 (opinion of O'CONNOR, J.) ("prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding"); *id.*, at ——, 110 S.Ct., at 2345 (SCALIA, J., concurring in judgment) (imposition of retroactive liability on a litigant would "*upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed ... overruled prior law. That would turn the doctrine of *stare decisis* against the very purpose for which it exists"). If a *Chevron Oil* analysis reveals, as it does, that retroactive application of *Bacchus* would unjustly undermine settled expectations, *stare decisis* dictates strongly against the Court's holding.

Justice SOUTER purports to have restricted the application of *Chevron Oil* only to a limited extent. *Ante*, at 2447. The effect appears to me far greater. Justice SOUTER concludes that the *Chevron Oil* analysis, if ignored in answering the narrow question of retroactivity as to the parties to a particular case, must be ignored also in answering the far broader question of retroactivity as to all other parties. But it is precisely in determining general retroactivity that the *Chevron Oil* test is most needed; the broader the potential reach of a new rule, the greater the potential disruption of settled expectations. The inquiry the Court summarized in *Chevron Oil* represents longstanding doctrine on the application of nonretroactivity to civil cases. See *American Trucking, supra*, at ——-——, 110 S.Ct., at ——-——. Justice SOUTER today ignores this well-established precedent, and seriously curtails the *Chevron Oil* inquiry. His reliance upon *stare decisis* in reaching this conclusion becomes all the more ironic.

II

Faithful to this Court's decisions, the Georgia Supreme Court in this case applied the analysis described in *Chevron Oil* in deciding the retroactivity question before it. Subsequently, this Court has gone out of its way to ignore that analysis. A proper application of *Chevron Oil* demonstrates, however, that *Bacchus* should not be applied retroactively.

Chevron Oil describes a three-part inquiry in determining whether a decision of this Court will have prospective effect only:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, ... we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S., at 106–107, 92 S.Ct., at 355 (citations and internal quotations omitted).

Bacchus easily meets the first criterion. That case considered a Hawaii excise tax on alcohol sales that exempted certain locally produced liquor. The Court held that the tax, by discriminating in favor of local products, violated the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, by interfering with interstate commerce. 468 U.S., at 273, 104 S.Ct., at 3056. The Court rejected the State's argument that any violation of ordinary Commerce Clause principles was, in the case of alcohol sales, overborne by the State's plenary powers under § 2 of the Twenty-first Amendment to the United States Constitution. That section provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Court noted that language in some of our earlier opinions indicated that § 2 did indeed give the States broad power to establish the terms under which imported liquor might compete with domestic. See 468 U.S., at 274, and n. 13, 104 S.Ct., at 3057, and n. 13. Nonetheless, the Court concluded that other cases had by then established "that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.*, at 275, 104 S.Ct., at 3057. Relying on *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the Court concluded that § 2 did not protect the State from liability for economic protectionism. 468 U.S., at 275–276, 104 S.Ct., at 3057–3058.

The Court's conclusion in *Bacchus* was unprecedented. Beginning with *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), an uninterrupted line of authority from this Court held that States need not meet the strictures of the so-called "dormant" or "negative" Commerce Clause when regulating sales and importation of liquor within the State. *Young's Market* is directly on point. There, the Court rejected precisely the argument it eventually accepted in *Bacchus*. The California statute at issue in *Young's Market* imposed a license fee for the privilege of importing beer into the State. The Court concluded that "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege" because doing so directly burdens interstate commerce.

299 U.S., at 62, 57 S.Ct., at 78. Section 2 changed all of that. The Court answered appellees' assertion that § 2 did not abrogate negative Commerce Clause restrictions. The contrast between this discussion and the Court's rule in *Bacchus* is stark:

> "[Appellees] request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.
>
> "The plaintiffs argue that, despite the Amendment, a State may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *Id.*, at 62–63, 57 S.Ct., at 78–79.

Numerous cases following *Young's Market* are to the same effect, recognizing the States' broad authority to regulate commerce in intoxicating beverages unconstrained by negative Commerce Clause restrictions. See, *e.g.*, *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 166, 84 L.Ed. 128 (1939); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951 (1945); *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283–284, 93 S.Ct. 483, 488–489, 34 L.Ed.2d 472 (1972); see generally *Bacchus*, *supra*, at 281–282, 104 S.Ct., at 3060–3061 (STEVENS, J., dissenting).

The cases that the *Bacchus* Court cited in support of its new rule in fact provided no notice whatsoever of the impending change. *Idlewild*, *Midcal*, and *Capital Cities*, *supra*, all involved States' authority to regulate the sale and importation of alcohol when doing so conflicted directly with legislation passed by Congress pursuant to its powers under the Commerce Clause. The Court in each case held that § 2 did not give States the authority to override congressional legislation. These essentially were Supremacy Clause cases; in that context, the Court concluded that the Twenty-first Amendment had not "repealed" the Commerce Clause. See *Idlewild*, *supra*, 377 U.S., at 331–332, 84 S.Ct., at 1297–1298; *Midcal*, *supra*, 445 U.S., at 108–109, 100 S.Ct., at 944–945; *Capital Cities*, *supra*, 467 U.S., at 712–713, 104 S.Ct., at 2707.

These cases are irrelevant to *Bacchus* because they involved the relation between § 2 and Congress' authority to legislate under the (positive) Commerce Clause. *Bacchus* and the *Young's Market* line concerned States' authority to regulate liquor unconstrained by the *negative* Commerce Clause in the absence of any congressional pronouncement. This distinction was clear from *Idlewild*, *Midcal*, and *Capital Cities* themselves. *Idlewild* and *Capital Cities* acknowledged explicitly that § 2 trumps the negative Commerce Clause. See *Idlewild*, *supra*, 377 U.S., at 330, 84 S.Ct., at 1296 (" 'Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause....' "), quoting *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394, 59 S.Ct. 254, 255, 83 L.Ed. 243 (1939); *Capital Cities*, *supra*, 467 U.S., at 712, 104 S.Ct., at 2707 (" 'This Court's decisions ... have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause.' ... § 2 reserves to the States pow-

er to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"), quoting *Craig v. Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976).

In short, *Bacchus*' rule that the Commerce Clause places restrictions on state power under § 2 in the absence of any congressional action came out of the blue. *Bacchus* overruled the *Young's Market* line in this regard and created a new rule. See *Bacchus*, 468 U.S., at 278–287, 104 S.Ct., at 3059–3064 (STEVENS, J., dissenting) (explaining just how new the rule of that case was).

There is nothing in the nature of the *Bacchus* rule that dictates retroactive application. The negative Commerce Clause, which underlies that rule, prohibits States from interfering with interstate commerce. As to its application in *Bacchus*, that purpose is fully served if States are, from the date of that decision, prevented from enacting similar tax schemes. Petitioner James Beam argues that the purposes of the Commerce Clause will not be served fully unless *Bacchus* is applied retroactively. The company contends that retroactive application will further deter States from enacting such schemes. The argument fails. Before our decision in *Bacchus*, the State of Georgia was fully justified in believing that the tax at issue in this case did not violate the Commerce Clause. Indeed, before *Bacchus* it did not violate the Commerce Clause. The imposition of liability in hindsight against a State that, acting reasonably would do the same thing again, will prevent no unconstitutionality. See *American Trucking*, 496 U.S., at ——, 110 S.Ct., at —— (opinion of O'CONNOR, J.).

Precisely because *Bacchus* was so unprecedented, the equities weigh heavily against retroactive application of the rule announced in that case. "Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern.... By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking, supra*, at ——, 110 S.Ct., at 2333 (opinion of O'CONNOR, J.). In this case, Georgia reasonably relied not only on the *Young's Market* line of cases from this Court, but a Georgia Supreme Court decision upholding the predecessor to the tax statute at issue. See *Scott v. Georgia*, 187 Ga. 702, 705, 2 S.E.2d 65, 66 (1939), relying on *Young's Market* and *Indianapolis Brewing*.

Nor is there much to weigh in the balance. Before *Bacchus*, the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no reason to anticipate.

The equitable analysis of *Chevron Oil* places limitations on the liability that may be imposed on unsuspecting parties after this Court changes the law. James Beam claims that if *Bacchus* is applied retroactively, and the Georgia excise tax is declared to have been collected unconstitutionally from 1982 to 1984, the State owes the company a $2.4 million refund. App. 8. There are at least two identical refund actions pending in the Georgia courts. These plaintiffs seek refunds of almost $28 million. See *Heublein, Inc. v. Georgia*, Civ. Action No. 87-3542-6 (DeKalb Super.Ct., Apr. 24, 1987); *Joseph E. Seagram & Sons, Inc. v. Georgia*, Civ.Action No. 87-7070-8 (DeKalb Super.Ct., Sept. 4, 1987). Brief for Respondents 26, n. 8. The State estimates its total potential liability to all those taxed at $30 million. *Id.*, at 30. To impose on Georgia and the other States that reasonably relied on this Court's established precedent such extraordinary retroactive liability, at a time when most States are struggling to fund even the most basic services, is the height of unfairness.

We are not concerned here with a State that reaped an unconstitutional windfall from its taxpayers. Georgia collected in good faith what was at the time a constitutional tax. The Court now subjects the State to potentially devastating liability without fair warning. This burden will fall not on some corrupt state government, but ultimately on the blameless and unexpecting citizens of Georgia in the form of higher taxes and reduced benefits. Nothing in our jurisprudence compels that result; our traditional analysis of retroactivity dictates against it.

A fair application of the *Chevron Oil* analysis requires that *Bacchus* not be applied retroactively. It should not have been applied even to the parties in that case. That mistake was made. The Court today compounds the problem by imposing widespread liability on parties having no reason to expect it. This decision is made in the name of "equality" and "*stare decisis*." By refusing to take into account the settled expectations of those who relied on this Court's established precedents, the Court's decision perverts the meaning of both those terms. I respectfully dissent.

Michael BARNES, Prosecuting Attorney of St. Joseph County, Indiana, et al.

v.

GLEN THEATRE, INC., et al.

No. 90–26.

Argued Jan. 8, 1991.

Decided June 21, 1991.

Establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at establish-